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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

XAVIER KEITH CROSBY,

Defendant and Appellant.

A114277

(Alameda County
Super. Ct. No. 149645-B)

Appellant Xavier Keith Crosby pleaded guilty to one count each of first-degree residential robbery and forcible rape, and admitted a ten-year enhancement to the robbery count for personal use of a firearm. He was sentenced to the agreed term of 24 years. Later, following an oft-continued restitution hearing, the court ordered appellant to pay \$2550 to a robbery victim and \$4015 to the rape victim, the latter jointly and severally with co-defendant Michael Talford.

Appellant appeals only the restitution order, and only the \$4,015 aspect of it, contending that such order “was an abuse of discretion and violated due process.” We conclude that such contention has no merit, and we affirm.

BACKGROUND

Appellant was charged with six felony counts arising out of two incidents, only one of which is pertinent here: the August 14, 2004 rape of a victim identified below as Jane Doe No. 1. A detailed recitation of the facts is not necessary to the issue before us, and suffice to recite the essential facts, taken from the probation report: Talford called Jane Doe at an escort service and arranged to have her meet him at an airport hotel; after

she arrived at the room appellant appeared out of a closet and demanded money; and when no money could be located, Talford forced Jane Doe to orally copulate him and, while she did, appellant raped her from behind, after which so did Talford. Then, as appellant was cleaning up the crime scene, Talford again demanded money and then stole Jane Doe's "diamond ring and ankle bracelet."

Appellant entered a written and oral waiver of rights and entered a plea of guilty to one count each of first degree residential robbery and forcible rape; he also admitted a ten-year enhancement to the robbery count for personal use of a firearm. (Pen. Code, §§ 211, 261, subd. (a)(2), 12022.53, subd. (b).)¹

Taking appellant's plea in textbook fashion, Judge Rolefson explained all of the ramifications of the plea. And as particularly applicable here, Judge Rolefson explained about restitution fines, and how those fines will be "in addition to any restitution you may have to pay if the victim has suffered any out-of-pocket loss because of this." He then asked appellant if he understood, and appellant said, "Yes, sir."²

On February 17, 2006, appellant was sentenced to the agreed term of 24 years in state prison. A restitution hearing was set for February 24, 2006, and then continued to April 14, and again to April 18.

Meanwhile, on January 3, 2006, Jane Doe had submitted an Alameda County "Probation Department Claim Form" on which she "request[ed] restitution as documented below." Below was this:

¹ The People moved to dismiss two counts of robbery, one count of penetration by a foreign object in concert, one count of oral copulation in concert, and three enhancement clauses attached to the admitted rape count, and to accept the admitted rape count as a lesser offense of an additional charged count of penetration by a foreign object in concert.

² Appellant also understood he could be "on the hook" for restitution even for the charges that were dismissed. (*People v. Campbell* (1994) 21 Cal.App.4th 825, 830.)

Property/Wage Loss . . .	Current or Replacement Value
14 karat white gold diamond ring	\$ apprx. \$4000 + plus.
Silver initial “L” anklet	\$15.00 ³

Probation Officer Josephine Lockard communicated with Jane Doe about the jewelry following which, as pertinent here, Lockard recommended “that defendants be ordered to pay restitution in the amount of \$4,015.00 jointly and severally to Jane Doe No. 1.”

The restitution hearing began on April 18, 2006, at which the People submitted the restitution claim on the probation report and the police report, of which the court took judicial notice. As germane to the issue here, the probation report showed that appellant and Talford both raped Jane Doe on August 14, 2005, and that, while appellant cleaned up the crime scene, Talford took a diamond ring and an ankle bracelet.

At the April 18, 2006 hearing, the People offered to provide appellant’s counsel with contact information for Jane Doe to facilitate her being served with a subpoena. The court advised counsel for appellant that, as counsel was not aware that no witnesses would be called by the People, he was entitled to a continuance, and the restitution hearing was continued to May 12, 2006. The April 18, 2006 hearing ended with the following colloquy:

“THE COURT: And that will be the schedule then But I’m already taking judicial notice of this.

“MR. RYKEN [Deputy District Attorney]: Thank you, your Honor.

“THE COURT: . . . Your case says what you claim it says, in that you can start with the probation report. The probation report can be considered, hearsay can be

³ The restitution claim form was accompanied by a three-page typed statement from Jane Doe setting forth, among other things, the horrible effect on her caused by the rape.

considered. In this particular case, we're talking about pleading to the direct charge, the loss already described, as not value.

"Now we have a statement purportedly from the victim giving value. There's actually two victims here, there's a second one in dispute also?"

"MR. KELVEN [counsel for appellant]: Yes, Judge, there was a—

"THE COURT: Either \$2250 or \$2550. Again, I'm taking what I have. If you want to further dispute it, bring in a witness.

"MR. KELVEN: My intention is to cross-examine the probation officer who wrote the report.

"THE COURT: Well, logically, can technically be examined, you'll be calling the person as your witness.

"MR. KELVEN: Yes.

"THE COURT: But if you want—if you've got that person under subpoena, and you've talked to the person, you'll know if it's going to be of any help.

"MR. KELVEN: That's true.

"THE COURT: So you can decide whether or not to have the person here. You can also call in the victims, if you need cooperation in reaching them to have them here, so you can subpoena them. Talk to Mr. Ryken about that. . . ."

All necessary participants were not present on May 12, 2006, so the court continued the hearing to May 15, 2006, when it occurred. There were appearances by the district attorney and counsel for both appellant and Talford; appellant was also present. Counsel for appellant expressly acknowledged that he chose not to subpoena Jane Doe, further acknowledging that *People v. Bauman* (1985) 176 Cal.App.3d 67, authorized the procedure followed at the April 18 hearing.

Appellant's counsel then called Probation Officer Lockard, who testified about the genesis of the restitution claim form, how it had been sent blank to Jane Doe and returned with the stolen items filled in. Lockard then testified about her contact with Jane Doe about the jewelry, that she asked Jane Doe about the value on the claim form and was told that the \$4000-plus value on the ring was based on what her ex-boyfriend told her he

had paid for it. Jane Doe further explained that she had no receipt for the ring, or any photographs of it, and that she was no longer on good terms with her ex-boyfriend.

Following the hearing the court ordered appellant and Talford jointly and severally liable for \$4,015 in restitution to Jane Doe, from which order appellant filed a timely notice of appeal.

DISCUSSION

Article I, section 28, subdivision (b) of the California Constitution, added by Proposition 8 in 1982, declares that there is a constitutional right of restitution. (See *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) This constitutional mandate is implemented by Penal Code section 1202.4, subdivision (f), which provides as follows: “in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.” The amount of such restitution “shall be of a dollar amount that is sufficient to fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant’s criminal conduct, including, but not limited to . . . [¶] (A) Full . . . payment for the value of stolen or damaged property.” (Pen. Code, § 1202.4, subd. (f)(3)(A).)

Writing for Division Three of this court, Justice Corrigan distilled the applicable rules governing our review: “We review the trial court’s restitution order for abuse of discretion. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.) No abuse of discretion will be found when there is a factual or rational basis for the amount of restitution ordered. (*People v. Dalvito* (1997) 56 Cal.App.4th 557, 562. ‘While it is not required to make an order in keeping with the exact amount of loss, the trial court must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.’ (*Thygesen, supra*, at p. 992.)” (*People v. Hudson* (2003) 113 Cal.App.4th 924, 927.)

Appellant himself acknowledges this rule, and more: in his words, a “ ‘victim’s restitution right is to be broadly and liberally construed.’ When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court. (*People v. Baker* (2005) 126 Cal.App.4th 463, 467.)”

This standard of review is, of course, the most difficult one for an appellant to show, as we will set aside a trial court ruling only upon a showing of “a clear case of abuse” and “a miscarriage of justice.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) A trial court abuses its discretion only when its ruling “ ‘fall[s] ‘outside the bounds of reason.’ ” [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 88.) An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court’s decision exceeds the bounds of reason and results in a miscarriage of justice. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) There was no clear abuse of discretion here. And certainly no miscarriage of justice.

Appellant argues that the “trial court relied upon the most unreliable of sources in determining the amount of restitution. Jane Doe did not testify Her hearsay statements that the ring was worth \$4,000 were introduced through the testimony of the probation officer.” Recognizing that hearsay is admissible in restitution hearings (see *People v. Bauman, supra*, 176 Cal.App.3d at p. 81), appellant nevertheless goes on, asserting that here the value testimony was essentially double hearsay, coming first from Jane Doe’s ex-boyfriend. And from there, appellant continues, however speculatively, that Jane Doe “was an escort,” and “even if her ex-boyfriend was not her pimp” he may have “simply told” her the ring was worth \$4,000 to “impress her.” We are not impressed.

To begin with, appellant did not object below to the introduction of the probation report, not on double hearsay grounds, not at all. Absent such objection, appellant cannot be heard to complain here.

“ ‘[A]s a general rule, “the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.” [Citations.] . . . This rule applies equally to any claim on appeal that the evidence was erroneously admitted, other than the stated ground of the objection at trial. When an objection is made to proposed evidence, the specific ground of the objection must be stated. The appellate court’s review of the trial court’s admission of evidence is then limited to the stated ground for the objection. (Evid. Code, § 353.)’ ” (*People v. Kennedy* (2005) 36 Cal.4th 595, 612; see also *People v. Boyette* (2002) 29 Cal.4th 381, 424 [“Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence”].)

Moreover, appellant cites no case, and we have found none, which holds that while hearsay is admissible, double hearsay is not. But even if that were the rule, any problem posed by it would be overcome by the rule that an owner is always competent to testify as to value. (See *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921.)

Finally, appellant’s argument ignores the case law, such as in *People v. Collins* (2003) 111 Cal.App.4th 726, which held that when the probation report includes a discussion of the victim’s loss and a recommendation on the amount of restitution, the defendant must come forward with contrary information to challenge the amount. (*Id.* at p. 734.) In sum, there is a factual and rational basis for the amount of restitution ordered.

That the value has a basis in fact is confirmed by the colloquy at the hearing, which perceptively observed that, if Jane Doe were in fact exaggerating the value of the ring, why would she value the ankle bracelet at \$15? And why would she not have claimed expenses for counseling and other expenses caused by the rape?

Appellant cites one case which held that there was insufficient evidence to support the restitution award: *People v. Vournazos* (1988) 198 Cal.App.3d 948. It is not availing. Vournazos was convicted of taking a vehicle without consent (Veh. Code, § 10851, subd. (a)), and as a condition of probation was ordered to pay restitution to the victim for items of personal property missing from the car, for the repair of damage to the car, and for lost wages. (*Vournazos, supra*, 198 Cal.App.3d at p. 952.) Though affirming

most of what the trial court ordered, the Court of Appeal reversed as to the amount of restitution, holding as follows: “In ordering defendant to pay \$2,180 in restitution, the trial court relied entirely on the recommendation of defendant’s probation officer who, in turn, derived the figure solely from Wright’s statement of loss and his discussions with Wright. Neither the statement nor the testimony of the probation officer established that the sum claimed by Wright for loss of property was based on the replacement cost of the property. Further, there was no evidence that the sum of \$300 claimed for repair of damage to the Mercedes represented the actual cost of the repair. While a defendant bears the burden of proving that the amount of restitution claimed by the victim exceeds repair or replacement cost of lost or damaged property (*People v. Hartley, supra*, 163 Cal.App.3d 126, 130), defendant here was not required to meet that burden inasmuch as the replacement or repair cost of Wright’s property was not established.” (*Id.* at pp. 958-959.)

Here, of course, the amount of restitution was not based on replacement cost, but on the value of the ring, of which there was evidence in the record.

As noted in the introduction, appellant’s sole argument is in the conjunctive, and includes a claim for lack of “due process.” Appellant’s brief, however, makes no argument about any lack of due process, so the issue can be considered waived. (See generally 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, pp. 627-628.)

But such omission is perhaps not surprising, as *People v. Cain* (2000) 82 Cal.App.4th 81, 86, notes that a defendant’s due process rights at the restitution hearing are “very limited,” specifically holding, as directly relevant here, that a defendant does not have a constitutional right to confront witnesses at a restitution hearing, no right to call and cross-examine the psychotherapist who provided counseling to the victim and whose fees were included in the restitution order.

Furthermore, there could be no due process violation here, where appellant was provided a hearing, provided the opportunity to call Jane Doe, and had more than adequate opportunity to examine the probation officer.

DISPOSITION

The order appealed from is affirmed.

Richman, J.

We concur:

Haerle, Acting P.J.

Lambden, J.